United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,797

MOBILE VIDEO TAPES, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

ALICE CABLE TELEVISION CORPORATION,

SOUTHWEST CATV, INC.,

Intervenors.

On Appeal from a Decision of the
Federal Communications Commission

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STATEMENT OF QUESTIONS PRESENTED

In accordance with a prehearing stipulation dated August 30, 1967, approved by the Court on September 12, 1967, counsel for all of the parties agree that the following questions are presented by this appeal:

1. Whether the Commission erred in finding without hearing that a grant of the subject microwave applications would serve the public interest in the light of all of the facts of record with the Commission and the allegations made to the Commission by the appellant.

2. Whether the Commission erred in failing to consolidate for decision the subject microwave applications and co-pending common carrier microwave applications to provide television programs to the same geographical area.

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TABLE OF AUTHORITIES

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* Authorities on which Appellant principally relies.

Federal Communications Commission Cases:

* Authorities on which Appellant principally relies.

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Other Authorities:

* Authorities on which Appellant principally relies.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Mobile Video Tapes, Inc., pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(6) from a Memorandum Opinion and Order of the Federal Communications Commission released January 27, 1967 (R. 143-50) which denied Petitions to Deny filed by Appellant and granted applications of the Intervenors for construction permits for microwave radio stations.

Appellant, Mobile Video Tapes, Inc., is licensed by the Federal Communications Commission to operate Television Station KRGV-TV, Weslaco, Texas. The microwave radio applications granted by the Commission are for purposes of transmitting television programs from distant television stations to be distributed by Intervenors' existing and proposed community antenna television (CATV) systems in the vicinity of Weslaco, Texas, in communities served by Station KRGV-TV. These signals will compete with Station KRGV-TV for television viewers. Station KRGV-TV is dependent upon the numbers of its viewers for its ability to attract advertising and for the rates which it can charge for that advertising, and the competition from the signals to be distributed under the instant applications will cause Station KRGV-TV a loss of viewers and a loss of advertising revenues (R. 235, 803). Appellant, therefore, has standing as a party in interest in this matter. *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U.S. 470, 66 S. Ct. 693. It was so treated by the Commission in its decision.

STATEMENT OF THE CASE

Appellant is the licensee of Television Station KRGV-TV, Weslaco, Texas. Station KRGV-TV and another television station, KGBT-TV, Harlingen, Texas, are the only television stations operating in this area which is generally known as the Lower Rio Grande Valley. The Lower Rio Grande Valley is one of the smaller television markets in the United States, consisting of a number of small cities with a common economic base, agriculture. (R. 235, 240-41).

The Intervenor, Alice Cable Television Corporation (hereinafter called "Alice Cable") holds a franchise for a CATV system in McAllen, Texas, a city within the Grade A Coverage of Station KRGV-TV. Alice Cable filed applications with the Federal Communications Commission for construction permits for microwave radio stations for purposes of

transmitting the programs of five television stations in San Antonio, Texas, to McAllen for distribution over its CATV system to customers.[1]

On March 2, 1965, the Appellant filed a *Petition to Deny* the Alice Cable applications. The petition stated the small size of the market in which Station KRGV-TV operates and that it has been a continuous struggle for the two stations in this market, KRGV-TV, Weslaco, Texas, and KGBT-TV, Harlingen, Texas, to achieve the advertising revenues with which to survive and meet local programming needs. The *Petition* alleged, in brief, that the five San Antonio, Texas, television signals to be distributed to McAllen, Texas, which has a population of 32,728 persons and is the third largest city in the area, would cause revenue losses to Station KRGV-TV which would curtail the program service, including local programming, which Station KRGV-TV renders and would threaten the ability of Station KRGV-TV to survive. Appellant alleged that for the same reasons the microwave grants would postpone or render impossible the institution of a third local station and third full network station in the area, thereby frustrating the Commission's UHF television assignments in the area.

Appellant further alleged that another company, Southwest CATV, Inc. (hereinafter called "Southwest CATV"), had secured franchises to operate CATV systems in the cities of Brownsville, Mission, Edinburg and Pharr, Texas, all of which are served by Station KRGV-TV, which

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[1] Generally speaking, a CATV system may be described as a facility which receives and amplified the signals broadcast by one or more television stations and redistributes such signals by wire or cable to the homes or places of business of subscribing members of the public for a fee. The role of microwave facilities in the operation of such a system usually consists of the relay of television broadcast signals, normally picked up off-the-air at a point some distance from the transmitting broadcast antenna, through a series of one or more radio repeaters to a terminal point in or near the community served by the CATV, from which terminal point the signals are distributed by cable to the individual subscribers. In using microwave service, a CATV operator reaches out to obtain signals that cannot be received by means of an off-the-air antenna installation, or to obtain better reception of signals that can only be received marginally off-the-air. First Report and Order, Docket Nos. 14895 and 15233, 30 F.C.C. 2d 683, 4 Pike & Fischer R.R. 2d 1725 (1965), footnote 1.

it proposed to provide with the programs of the three Corpus Christi network television stations, an independent station in Fort Worth, and an educational television station and an independent station in San Antonio, Texas. It was further alleged that franchises for CATV had been granted in Edinburg and San Benito, and were under consideration in Harlingen and Weslaco, and that all franchise holders and applicants proposed to provide four or more television signals imported from stations outside the area. The communities and their 1960 U. S. Census populations were as follows:

Community	1960 Census Population
Brownsville	48,040
Edinburg	18,706
Harlingen	41,207
McAllen	32,728
Mission	14,081
Pharr	14,106
San Benito	16,422
Weslaco	15,649
Total	200,939

These communities were within the Grade A or better coverage contour of Station KRGV-TV except for Mission which was within its Grade B contour.[2] The 1960 U. S. Census population of Hidalgo, Willacy, and Cameron Counties, which are the principal Grade A coverage areas of Station KRGV-TV and KGBT-TV, is only 352,086. It was alleged that CATV operations in these communities will very likely destroy Station KRGV-TV and will render the establishment of stations on the UHF channels assigned to the area an impossibility (R. 790-811).

Appellant requested a hearing pursuant to Section 309 of the Communications Act (47 U.S.C. 309) and the principles of *Carter Mountain Transmission Corp. v. Federal Communications Commission,* 103 U.S. App. D.C. 346, 258 F.2d 440 (1958) and *Louisiana Television Broadcasting Corp. v. F.C.C.*, 121 U.S. App. D.C. 24, 347 F.2d 808 (1965) before the applications were granted

[2] See footnote 8, infra.

On May 17, 1965, applications were filed by Southwest CATV, Inc. (hereinafter called "Southwest CATV") for authorizations to construct microwave stations to import the programs which it proposed to carry on its CATV systems to Brownsville, Mission, Edinburg and Pharr, Texas. Appellant filed a *Petition to Deny* the Southwest CATV applications on June 25, 1965, making essentially the same allegations which it had made in the *Petition to Deny* the Alice Cable applications (R. 223-35, 240-44, 248).

On July 6, 1965, the Commission released a Memorandum Opinion and Order which denied Appellant's Petition to Deny against the Alice Cable applications (hereinafter called the first or old "Alice Cable" decision). The Commission did not discuss the majority of the factual allegations made by Appellant, including the populations proposed to be served by CATV in places other than McAllen, the part of Station KRGV-TV's small market which this represented or the number of imported channels of programming proposed to be carried on them. It held that the combined gross annual revenues of Stations KRGV-TV and KGBT-TV of over $1,000,000 in 1964 and the fact that both stations had operated profitably, as shown by annual financial reports for the stations in its files, belied the allegations of economic harm, that the Commission carriage and non-duplication rules (47 C.F.R. 74.1103) would provide "adequate" safeguards for local stations and that the "naked" allegations of competitive injury raised no substantial and material question of fact. It granted the applications to serve the CATV system in McAllen (R. 678-83).

On August 4, 1965 Appellant filed with this Court a Notice of Appeal from this decision. On August 6, 1965 the Commission set aside its grant of the Alice Cable applications for technical engineering reasons (R. 501-684). In the light of this Commission action, an Agreement of Dismissal of the appeal by counsel for Appellant and the Intervenor, Alice Cable, dated August 26, 1965, was filed with this Court (Case No. 19576).

Thereafter applications were filed by American Television Relay, Inc. (hereinafter called "American Television Relay") for the purpose of constructing common carrier microwave radio stations whereby the programs of Stations KTVT, Fort Worth, Texas, KLRN and KWEX, San Antonio, Texas, and KZTV, KRIS and KIII, Corpus Christi, Texas, would be delivered to Alice Cable's CATV system in McAllen,[3] Texas, and to Valley Microwave Transmission, Inc., for distribution on CATV systems for which it had obtained franchises in Edinburg, Harlingen and San Benito, Texas. In December 1965, Appellant filed a *Petition to Defer Action or, in the Alternative, to Deny Application* against these applications. The *Petition* referred to the pending applications of Alice Cable and Southwest CATV and was served on their counsel; it referred to the *Petitions to Deny* and *Replies* filed by Appellant with respect to the Alice Cable and Southwest CATV applications, stating that the contentions made in them were equally applicable to the applications of American Television Relay, Inc. The *Petition* stated that the American Television Relay, Inc. applications should be considered with the applications of Alice Cable and Southwest CATV, with consideration of the joint effect of all of them (R. 685-89).

Thereafter another applicant, West Texas Microwave Company, filed applications for common carrier microwave radio stations to deliver the programs of Stations KTVT, Fort Worth, Texas, KLRN and KWEX, San Antonio, Texas, and XEFE-TV, Nuevo Laredo, Mexico, to Southwest CATV for distribution over its CATV systems in Brownsville, San Benito, Weslaco, Mercedes, Alamo, Donna, Pharr, McAllen, Mission, and Edinburg, Texas. On November 22, 1966, Appellant filed a *Petition to Deny* these applications. Appellant alleged that Southwest CATV had purchased all of the franchises for CATV previously held by

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[3] Delivery in McAllen technically was to be to McAllen Cable Television Corporation, a wholly owned subsidiary of Alice Cable Television Corporation.

Valley Microwave Transmission, Inc., with the result that Southwest CATV holds franchises in every community in the Rio Grande Valley which has granted such franchises. Petitioner showed that by this time the CATV proposals for the Lower Rio Grande Valley represented potential competition to Station KRGV-TV from numerous channels of imported television programming in communities with a population of 240,327 persons. It showed that there were conflicting representations before the Commission as to the stations which would be carried on the CATV systems and that serious questions were raised due to the apparent duplication of services proposed to be rendered under the various co-pending microwave applications. The Petition rebutted the inference of financial prosperity which the Commission had made in its first, "Alice Cable" decision. It included details of the award winning local programming of Station KRGV-TV and the large and expensive staff necessary to operate the station, and it included details on its expensive library of film programming and the fact that practically all of it would be duplicated by imported signals (R. 690, 701-49, 757-63). These allegations are discussed more fully hereinafter.

On the same day that the *Petition to Deny* the West Texas Microwave applications was filed, Appellant filed a *Supplement to Petition to Defer Action or, in the Alternative, to Deny Application* against the above referenced applications of American Television Relay, Inc. The *Supplement* incorporated by reference the *Petition to Deny* filed against the applications of West Texas Microwave, Inc. and requested that all four sets of applications (Alice Cable, Southwest CATV, American Television Relay and West Texas Microwave) be considered together. Copies of the *Petition* against West Texas Microwave, Inc. and the *Supplement* against American Television Relay, Inc. were served on counsel for Alice Cable and Southwest CATV (R. 690, 698-700).

On January 27, 1967 the Commission released its Memorandum Opinion and Order, which is the subject of this appeal, denying Appellant's Petitions to Deny and granting the applications of Alice Cable and

Southwest CATV. The Commission held that its decision here was controlled by its old, "Alice Cable" decision. The Commission did not include the populations proposed to be served by CATV throughout Station KRGV-TV's market or any of the facts which it had failed to include in the old decision. It did not use more recent financial information for Station KRGV-TV which had become available in its files in the interval. Although the Commission referred in its decision to the American Television Relay applications, it made no reference to the Appellant's request that they be considered with the instant applications or to the additional facts which Appellant had alleged in the pleadings filed with those applications. The Commission held, rather, that Appellant had alleged nothing new since the first, "Alice Cable" decision (R. 143-50).

Three Commissioners dissented from the Commission's decision. Commissioner Cox wrote a dissenting opinion.

Following the filing of Appellant's Notice of Appeal in this case the Appellant and the Intervenor, Southwest CATV, entered into an agreement which settles this litigation insofar as it would affect Southwest CATV. The agreement limits the number of channels of programming which Southwest CATV may import into the Lower Rio Grande Valley and distribute on its CATV systems there, and provides certain protections to the film and syndicated programs which Appellant purchases with the exclusive right of distribution in the Lower Rio Grande Valley.

The agreement with Southwest CATV, however, does not affect this litigation insofar as it concerns the Intervenor, Alice Cable, nor does it in any way limit the issues with respect to Alice Cable. Under the agreement there will be CATV service with numerous, competing imported signals from outside of the Lower Rio Grande Valley and the applications of Alice Cable must be considered in the light of this overall CATV activity. There also remain the issues arising out of the Commission's failure to consider together all of the proposals to import programming for distribution by CATV in the Lower Rio Grande Valley.

STATUTES AND RULES INVOLVED

The relevant portions of the Communications Act of 1934, as amended, and the rules and regulations of the Federal Communications Commission are set forth in the Appendix to this brief.

STATEMENT OF POINTS

(1) The allegations of the Appellant raised a substantial and unresolved issue of potential diminution and loss of television service to the public which required a hearing under Sections 309(d) and (e) of the Communications Act.

(2) The Commission's determination that its original decision with regard to microwave applications to provide television programs for distribution by CATV in the city of McAllen, Texas, was controlling in the instant proceeding was in error.

(3) The Commission's decision is based on erroneous factual assumptions and fails to state or evaluate numerous facts alleged by Appellant which were relevant and material to the issues presented, contrary to Sections 309(d) and (e) of the Communications Act.

(4) The Commission's decision without a hearing that the proposed CATV operations posed no substantial threat to future establishment of a third, UHF television station in the Lower Rio Grande Valley was contrary to its own decisions and policy determinations.

(5) The Commission was required to consider all applications pending before it for microwave radio authorizations to provide programs for CATV distribution within the coverage of Station KRGV-TV in order to determine the impact of the instant applications on present and future local broadcast television service to the public.

(6) The Commission was required to consider all of the applications for microwave radio stations pending before it in order to avoid apparent duplication of service and waste of available frequencies contrary to its frequency allocation policies.

SUMMARY OF ARGUMENT

I.

The applications granted by the Federal Communications Commission in this proceeding are for microwave radio authorizations by which numerous programs from distant television stations are to be imported into the Lower Rio Grande Valley of Texas for distribution over CATV systems located there. Appellant alleged substantial facts showing that the grant of these applications would cause harm to the public interest by diminution and possible loss of local television service. These facts are detailed hereinafter; it may be noted here that they covered the small size of the market, the history of marginal operation and struggle to achieve advertising revenues of the two local stations, the extensive local programming of Station KRGV-TV, the substantial staff and expense necessary to operate Station KRGV-TV and provide local programming, the reduction of its audience and duplication of its programming which would occur and the fact that this duplication, especially by imported programs from major markets, would cause severe losses in revenue to Station KRGV-TV. It was specifically alleged that these losses would require a reduction in the extensive local programming presented by Station KRGV-TV. These allegations were unrebutted and required a hearing under Sections 309(d) and (e) of the Communications Act before the microwave applications could be granted.

In its decision here under review the Commission determined that its prior decision, with respect to the applications of Alice Cable Television Corporation only to serve McAllen, Texas, was controlling. In

that decision the Commission had held Appellant's allegations that the Alice Cable applications would not serve the public interest to be "naked assertions", devoid of supporting facts, which raised no substantial and unresolved question of fact. The Commission, however, did not set forth the majority of the factual allegations of the Appellant including, for example, the total population then proposed to be served by CATV in the Rio Grande Valley, the relationship of this population to Station KRGV-TV's limited market or the fact that all the CATV franchisees in the Lower Rio Grande Valley proposed to distribute four or more channels of imported programming. Had the Commission properly considered the full potential of all CATV activity proposed in the Lower Rio Grande Valley Market and all of Appellant's allegations showing the injury to the public interest which they would cause, it would have been required to designate the Alice Cable applications for hearing in its first decision.

The Commission erred, further, in stating that it had considered substantially all proposed CATV activity in the Lower Rio Grande Valley in its first decision. In fact, not only did it not state or consider the facts for the market as a whole but also it expressly deferred consideration of other proposed CATV systems in the Lower Rio Grande Valley for later consideration. As a result of attempting to rely on its first decision, the Commission never stated or considered the majority of Appellant's allegations in either decision.

The Commission's holding, without discussion of the merits, in its first decision, repeated in the decision here under appeal, that its carriage and non-duplication rules (47 C.F.R. 74.1103) would provide "adequate" protection to Station KRGV-TV and the public interest are erroneous. The Commission has made no policy judgment that its carriage and non-duplication rules will adequately protect the public interest either in all or any particular situations. The carriage and non-duplication rules were adopted by the Commission as *minimum* requirements. The Commission expressly recognized that individual stations and markets would

require individual, *ad hoc* consideration. It created a new section of the rules providing *ad hoc* procedures for this purpose as well as expressly preserving *ad hoc* procedures under Section 309 of the Act.

To bolster its attempt to rely on its original "Alice Cable" decision the Commission stated that Appellant had submitted nothing new since the old, "Alice Cable" decision which required reconsideration of the result reached there, apparently suggesting that nothing further could be alleged. In fact, Appellant had submitted substantial new, supporting data. This data rebutted an assumption of financial prosperity for Station KRGV-TV which was the single fact upon which the Commission had relied in its first decision. It gave additional facts concerning the staff required for Station KRGV-TV, its extensive award winning local programming and the almost complete duplication of its library of film programs which would occur from imported programming. It included the affidavit of its national sales representative indicating that the proposed CATV systems would drastically curtail the revenues of Station KRGV-TV; this was in addition to and in accord with the affidavit of the national sales representative of Station KGBT-TV, the other station in the Lower Rio Grande Valley, which was before the Commission at the time of the first Alice Cable decision (although not mentioned in it). It also stated the number of competing channels of programming proposed to be distributed by Alice Cable and Southwest CATV on their CATV systems, which was substantially more than assumed by the Commission. None of these facts were stated or considered by the Commission.

The Commission's decision is erroneous in the facts it states, fails to consider the bulk of the relevant facts before it and cannot be sustained.

The Commission, similarly, erroneously assumed without discussion that its rules for carriage and non-duplication by CATV systems of the programs of local television stations would protect a future third, UHF station in the Lower Rio Grande Valley and preserve the opportunity for establishment of such a station. This was contrary to the Commission's own policy statements indicating that CATV poses a serious threat

to the establishment of such a station and to Appellant's allegations specifically stating why, based on the nature of the market and its own experience in it, the importation of programming from major markets would tend to foreclose the possibilities for a third, UHF station. The Commission's decision here is contrary to its strong and uniformly applied policy to protect the opportunities for UHF stations from the intrusion of competitive programming from other markets.

Appellant's allegations of harm to the public interest by diminution or loss of television service were unrebutted. They required a hearing under Section 309 of the Communications Act.

II.

At the time of the Commission's decision there were pending before the Commission not only the applications of the Intervenors but also applications by two other applicants for common carrier authorizations to transmit programming to the Lower Rio Grande Valley. The applications proposed collectively the transmission of twenty-six channels of television programming for CATV distribution in the Lower Rio Grande Valley. The Commission could not determine the extent of proposed CATV activity and potential impact on local television service in the Lower Rio Grande Valley without considering all of these co-pending proposals. Moreover, there were apparent inconsistencies in these various proposals — duplication by the common carriers of the programming proposed to be imported by the Intervenors who, on the other hand, were the proposed customers of the common carriers — which raised questions as to the true intentions of the parties and the use which would be made of Intervenors' microwave systems once they were granted. Appellant had requested that all pending applications for microwave authorizations to import programming to the Lower Rio Grande Valley be considered together. It was erroneous for the Commission to fail to do so.

The Commission was required to designate all of the co-pending microwave applications for hearing to determine which of them would best serve the public interest under Section 303 and 307 (47 U.S.C., 303 and 307) of the Act. The applications are duplicitous on their face and raise a serious issue under the Commission's longstanding policies for conserving the use of available frequency spectrum.

ARGUMENT

I.

PETITIONER'S ALLEGATIONS RAISED SUBSTANTIAL AND UNRESOLVED QUESTIONS OF FACT WHICH REQUIRED A HEARING UNDER SECTION 309(e) OF THE COMMUNICATIONS ACT

It is well settled that under the Communications Act the Commission is required to consider whether the grant of a broadcast authorization will lead to harm to the public interest by virtue of a diminution or loss of program service to competing station, *Carroll Broadcasting Co. v. Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F.2d 440 (1958). The principle of the *Carroll* case applies where the injury to a broadcast service would be caused by a CATV system. Thus, in *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 231 F.2d 359, *cert. den.* 375 U.S. 951 (1963), this Court held that the *Carroll* doctrine was properly applied upon allegations that the grant of microwave applications to provide program service for distribution by CATV systems would adversely affect local television stations and their ability to provide local programming.

Where a broadcast licensee alleges that economic injury caused by a Commission grant will affect the public interest, the Commission is required to designate the application for such authorization for an evidentiary hearing so long as the allegations of injury to the public interest raise substantial issues of fact. Moreover, the Commission may

not impose such standards for allegation of injury as to make it, in effect, impossible for a protestant to have his day in Court. In *Folkways Broadcasting Company v. F.C.C.*, ___ U.S. App. D.C. ___, 375 F.2d 299 (1967), this Court made clear that the Commission may not require such precise allegations as "would eliminate the doctrine as a practical matter." The Court stated, "The specificity of allegations referred to in Section 309(d) must not be construed to require such exactness as is practically impossible." ___ U.S. App. D.C. at ___, 375 F.2d at 303.

The Commission in its decision in this case has failed to give effect to the specific allegations of injury to the public interest which Appellant claimed would flow from the Commission's grant. By terming them "naked" allegations, it has held that on their face they are insufficient to invoke the hearing procedures of Sections 309(d) and (e) of the Communications Act. The effect of the Commission's decision is to make it virtually impossible for a station licensee such as Appellant to secure a hearing on the impact which a CATV grant would have on an existing authorization. Despite detailed and precise allegations of fact, the Commission has held that Appellant is not entitled to a hearing and an opportunity to prove its case. It is in this context of summary rejection that we now address ourselves to the character of the allegations which the Commission held to be insufficient to entitle Appellant to hearing.

A. Appellant's Allegations of Injury to the Public Interest Were Enough to Entitle It to a Hearing on Whether a Grant of the Microwave Applications Would Result in Diminution or Destruction of Television Broadcast Service in the Lower Rio Grande Valley

Appellant's Petitions to Deny made sworn and detailed allegations which have not been even recognized by the Commission in its decision:

The Character of the Market and the Operating Experience of Station KRGV-TV.

(1) Appellant's Television Station KRGV-TV, Weslaco, Texas, operates in one of the smaller television markets of the United States. Weslaco, itself, Appellant's community, had a 1960 U. S. Census population of only 16,649 persons. The station serves an area known as the "Lower Rio Grande Valley" or the "Harlingen-Weslaco Market." Thus far, only two stations have been able to operate in the area — KRGV-TV and Station KGBT-TV, located in Harlingen. The whole market is composed of a series of relatively small communities linked by a common base and interest, agriculture. Under the 1960 U. S. Census the population of the entire Harlingen-San Benito Urbanized Area, which includes Weslaco, was only 61,658. J. Walter Thompson Company, *Population and Its Distribution, the United States Markets*, 8th ed., 1961, lists the Brownsville-Harlingen-Weslaco Market (which includes Weslaco and all of Cameron County) as a Class "C" Market, the 143rd market in the U. S. American Research Bureau (A.R.B.) lists the market as the "Lower Rio Grande Valley Market," the 163rd A.R.B. Television Market in the U.S.; Station KRGV-TV's Total Net Weekly Circulation is only 84,800 television homes.[4] Hildalgo, Willacy and Cameron Counties, which are the principal Grade A coverage

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[4] A.R.B. Market rankings are based on the highest A.R.B. Total Net Weekly Circulation achieved by the stations in each market. A.R.B. Total Net Weekly Circulation for a station is the number of television equipped homes which (based on sampling techniques) view the station at least once during a week. A.R.B. Market ranking and station Net Weekly Circulation figures are commonly accepted in the industry and by the Federal Communications Commission as a measure of market size and strength, and a station's economic base. By way of comparison, New York, N.Y. is the A.R.B. 1st Market based on Total Net Weekly Circulation of 5,375,400 homes; Raleigh-Durham, N.C. is the 50th Market based on a Total Net Weekly Circulation of 364,400 homes, and Albuquerque, N.M. is the 100th Market based on a Total Net Weekly Circulation of 179,300 homes.

areas of Stations KRGV-TV and KGBT-TV, have a combined 1960 U. S. Census population of 352,086 (R. 225, 706, 793-94).

(2) The history of small market television stations, such as the two stations in the Rio Grande Valley, has been a continuous struggle to achieve the advertising revenue with which to survive and fulfill the obligations to the communities they serve. These stations provide the same news, weather and sports coverage; they provide documentary and special events programs; they buy and present film programs, and they pay the same money for basic equipment such as cameras, film chains and video tape recorders as do stations in larger markets. Yet, the small market station, even under the most favorable conditions, can never have the same number of dollars available as do stations in larger markets with which to provide these services. Their local program service is, therefore, disproportionately more expensive in staff and equipment.

(3) National advertisers select their markets on the basis of the number of television sets that can be reached. In the Harlingen-Weslaco Market (the Lower Rio Grande Valley), this is relatively a very small number, and the result has been that there is hardly enough income for the two existing stations to operate properly. The average national advertising account is interested primarily and frequently exclusively in coverage in major markets. Small markets are considered only after major market coverage is set and then only by advertisers willing to spend money on those markets and with dollars remaining for the purpose. The top 50 or 100 markets will be automatic "buys" in most national campaigns. The small market stations are in competition with each other for the "left over" revenue in campaigns where it exists. As a result, in the three months

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areas of Stations KRGV-TV and KGBT-TV, have a combined 1960 U. S. Census population of 352,086 (R. 225, 706, 793-94).

(2) The history of small market television stations, such as the two stations in the Rio Grande Valley, has been a continuous struggle to achieve the advertising revenue with which to survive and fulfill the obligations to the communities they serve. These stations provide the same news, weather and sports coverage; they provide documentary and special events programs; they buy and present film programs, and they pay the same money for basic equipment such as cameras, film chains and video tape recorders as do stations in larger markets. Yet, the small market station, even under the most favorable conditions, can never have the same number of dollars available as do stations in larger markets with which to provide these services. Their local program service is, therefore, disproportionately more expensive in staff and equipment.

(3) National advertisers select their markets on the basis of the number of television sets that can be reached. In the Harlingen-Weslaco Market (the Lower Rio Grande Valley), this is relatively a very small number, and the result has been that there is hardly enough income for the two existing stations to operate properly. The average national advertising account is interested primarily and frequently exclusively in coverage in major markets. Small markets are considered only after major market coverage is set and then only by advertisers willing to spend money on those markets and with dollars remaining for the purpose. The top 50 or 100 markets will be automatic "buys" in most national campaigns. The small market stations are in competition with each other for the "left over" revenue in campaigns where it exists. As a result, in the three months

through January 31, 1965, of 65 products which were active with advertising campaigns in the Houston, Texas, Market only 5 sought television coverage in the Lower Rio Grande Valley Market. Similarly, network programs have not been seen in the Rio Grande Valley Market and, on network programs which are seen, numerous commercial announcements are not ordered and not presented over the Valley television stations.[5] To achieve success, a television station must secure a reasonable representation of national business which at stations in substantial markets will be on the order of 75% of the advertising business; at Station KRGV-TV national business has gone from a low of 36% in 1956 to a high of 59% in 1964.[6] The small market station must gain recognition in order to achieve these revenues and Station KRGV-TV has been steadily developing this as illustrated by its gradually increasing amount of national business, but this is a trend which can be easily reversed (R. 236-39, 804-07).

(4) In addition to the difficulty in obtaining advertising business, the small market station faces the additional fact that the rates which it can charge for this business are far less, due to the small populations it serves, than the rates which can be charged for the same business by a station in a major market. Thus, a 1 minute "prime time" commercial on a Houston, Texas station is worth a minimum of

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[5] Thus, the "Tonight Show" for the month of November for the years 1959 through 1964 had 716 commercials scheduled; only 197 or 27% of these commercials were ordered and presented by Station KRGV-TV (R. 238, 806).

[6] It is a matter of official notice that the Commission's TV Broadcast Financial Data - 1965, August 2, 1966, shows (Table I) that network and national advertising revenues constituted 81% of the aggregate revenues of all TV stations in 1965 and had been 81% to 82% of their revenues in every year beginning in 1958.

$380.00; on KRGV-TV it costs only $80. Thus, even if KRGV-TV had the same advertising as a station in Houston, Texas, its revenues, by reason of rates alone, would be only 21% of those for the Houston station (R. 240, 808).

(5) Other reasons make it difficult for the small market station to obtain a fair share of advertising revenues. The overhead in placing such advertising is greater, i.e., the persons supervising the placement of advertising cost more in the small market in proportion to the returns obtained. In addition, the advertising agencies which place the advertising are compensated far less for advertising placed on KRGV-TV. Thus, an agency placing a commercial message on a Houston station is compensated $57.00 (15% of $380.00); on Station KRGV-TV the same commercial message brings the agency only $10.80. There is no corresponding reduction, however, in the amount of time, paperwork and overhead required for the agency to place the business (R. 240, 808).

The Financial Condition of the Station

(1) The Annual Financial Reports for Station KRGV-TV for 1964 and 1965 which, under the Commission's Rules, are confidential, were voluntarily submitted by Appellant. They showed that in 1964 the station had gross revenues of $516,876, but a profit of only $31,597 and, in 1965, gross revenues of $700,895, but a reduction in profit to $24,493. The Affidavits pointed out that there are, in addition, unallocated interest payments on loans which in 1965 amounted to $68,036, of which the major part are attributable to KRGV-TV. These interest payments will continue for a number of years and mean that, in fact, Station KRGV-TV operates at a deficit. The owners of KRGV-TV have never drawn any salary, dividends or return of any kind from Station KRGV-TV (R. 716, 722-23, 740-45).

The Scope of the CATV Proposal

(1) Under the instant applications, the Intervenor, Alice Cable, proposed to transmit the programs of five San Antonio, Texas television stations, including the programs of three stations affiliated with the three national networks, to McAllen, Texas for distribution by its CATV system there. Alice Cable (through its operating subsidiary, McAllen Cable TV Corp., R. 377) also proposes to distribute on its CATV system in McAllen the programs of the three network stations in Corpus Christi, Texas, and the programs of three stations in Monterrey, Mexico, plus at least one channel of weather and news programming. Thus, in the aggregate Alice Cable proposes some twelve channels of programming to compete for viewers with the local television stations (R. 721-22).

(2) The applications of the Intervenor, Southwest CATV, proposed to transmit the programs of seven television stations from Nuevo Laredo, Mexico, and Fort Worth, San Antonio and Corpus Christi, Texas, including programs from stations in Corpus Christi affiliated with the three national networks, to Brownsville, Mission, Edinburg and Pharr, Texas to be distributed on CATV systems there. In addition, Southwest CATV proposed to distribute on its CATV systems the programs of a station in Monterrey, Mexico, time, weather and news channels and its own locally originated channel of movies, or a total of at least ten channels of programming to compete with the local television stations (*Ibid*).

(3) The Petition to Deny showed, further, that Southwest CATV, Inc. had purchased the CATV franchises formerly held by another potential CATV operator (Valley Microwave Transmission, Inc.) with the result that Southwest CATV, Inc. holds a franchise in every community where a franchise has been

granted in the Rio Grande Valley; thus, it was pointed out, the programs which it proposed to import could be expected to be distributed in all of the communities where franchises have been granted (*Ibid*).[7]

(4) The populations and households are as follows (R. 231-32, 244, 704-05, 724, 798-99):

	Population (1960 U.S. Census)	Households (1960 U.S. Census)
Alamo	4,121	883
Brownsville *	48,040	11,289
Donna	7,522	1,629
Edinburg **	18,706	4,271
Harlingen	41,207	10,071
La Feria	3,047	798
McAllen **	32,728	8,298
Mercedes	10,943	2,458
Mission *	14,081	3,373
Pharr *	14,106	3,115
Raymondville	9,385	2,196
San Benito	16,422	3,867
San Juan	4,371	1,066
Weslaco	15,649	3,458
Totals	240,327	56,772

* Operating

** Notifications of intention to commence operation received pursuant to Section 74.1105 of the Commission's Rules.

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[7] In any event, all franchise applicants had proposed to provide four or more signals from outside the area (R. 244, 811).

(5) These communities are the population centers and constitute, for practical purposes, the entire market (R.235).[8] They contain more people than in the Weslaco-San Benito Urbanized Area, more people than shown by J. Walter Thompson Co. for the entire Brownsville-Harlingen-San Benito Market. The Total Net Weekly Circulation of Station KRGV-TV was only 84,800 homes,[9] so the proposed CATV systems (based on 90% television receiver saturation in 56,772 households) of 51,095 television homes represented potential competition from imported programming in more than 60% of the homes reached by Station KRGV-TV in one week. Even assuming only a 50% CATV connection rate, it represents more than 30% of the homes which KRGV-TV reaches in one week and upon which it relies for its rates and advertising (R. 231-32, 235, 705-06, 721-22, 724, 798-99, 810-11).

(6) In addition to the foregoing channels of programming, as noted by Commissioner Cox in his dissent, there are other applications before the Commission discussed hereinafter, proposing to import additional programming for CATV distribution in the Lower Rio Grande Valley (R. 148).

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[8] All of these communities were within the Grade A or principal city contours of Station KRGV-TV except Mission which was within the Grade B contour. However, Station KRGV-TV held a construction permit for a new tower (since completed) which places Mission within its Grade A contour and all of the other communities within its principal city contour (R. 721, 725). A "Grade A" contour is the line representing the service area in which a good picture is available 90 per cent of the time at 70 per cent of receiver locations. A "Grade B" contour is the service area in which a good picture is available 90 per cent of the time at 50 per cent of receiver locations. See Sixth Report and Order, Federal Communications Commission, 17 Fed. Reg. 3905, 3915 (1952). The principal city contour represents a signal level higher than Grades A and B and is designed to render a premium quality signal to the principal community being served. A coverage map for Station KRGV-TV was submitted showing that beyond its Grade A contour there are hardly any communities (R. 725).

[9] See footnote 4, supra.

The Character of Appellant's Program Service

(1) Station KRGV-TV was an award winning station in the State of Texas in 1965 for its record of local programming. A 12-page summary of Station KRGV-TV's local programming was presented by Appellant together with a statement of the manhours required to produce the programs. It was shown that, apart from time of employees spent in producing announcement campaigns and promotions on behalf of local activities, production of local programs required 2,907 manhours (R. 719-20, 728-39).

(2) Station KRGV-TV has a full staff and presents a full schedule of local programming. This includes 4 to 6 locally produced film features daily and, during an eleven month period, 26 remote telecasts of matters of special interest to the Rio Grande Valley viewers. It includes local farm information which is of importance in this farming area (R. 240, 243-44, 810).

(3) A staff roster for Station KRGV-TV was submitted with the salaries of each individual and job descriptions for every person employed, so that the Commission could see the number of employees required and the expense in staff for the operation of Station KRGV-TV (R. 758-63).

(4) Station KRGV-TV has a film library under lease for periods of 1 to 5 years for its exclusive use in the Lower Rio Grande Valley Market. This library is under lease at a basic cost of $119,551, plus additional charges of $75 to $150 for each film presented in color and approximately $7,000 annually in shipping charges for the films. A list of these programs and other stations presenting them was filed showing that of the 35 series of films under contract, 31 would be duplicated by programs proposed to be imported to the CATV

systems, some of them from as many as three different stations (R. 717-18, 726-27).

The Manner in Which Appellant's Program Service Would Be Affected

(1) The numerous signals to be distributed by CATV will dilute the audience for Station KRGV-TV, reducing its number of viewers, thereby adversely affecting the rates which Station KRGV-TV can charge and reducing the amount of advertising business which it can attract. In addition, the film programs which Station KRGV-TV purchases with the exclusive right of presentation in its market will be reduced in value to advertisers because they will no longer be exclusive but will be duplicated by the same films imported from major market stations and presented via the CATV systems. National advertisers will lose interest in ordering Station KRGV-TV because they will know that their purchases in the major markets of Fort Worth, San Antonio and Corpus Christi[10] automatically include partial coverage in the Lower Rio Grande Valley Market, and the remainder of the market which Station KRGV-TV can offer after the partial, free coverage via CATV, will no longer be worth purchasing. This will cause loss of advertising and loss of network programs for which Station KRGV-TV will not be ordered by the sponsor.

(2) The Commission's Rules prohibiting simultaneous (same day) duplication by the local CATV systems of Station KRGV-TV's programs cannot prevent these results. The only effect of non-duplication rules is to prevent duplication by the CATV systems of the programs of Station KRGV-TV on the day

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[10] Ft. Worth, San Antonio and Corpus Christi are the A.R.B. 15th, 57th, and 141st Markets, with Total Net Weekly Circulations of 767,500, 319,600 and 111,800 homes, respectively.

that they are presented by Appellant. They have no effect on the loss of audience to Station KRGV-TV from the competition for viewers from numerous additional channels of program service. They cannot prevent the duplication of Station KRGV-TV's film programs which will almost never be presented on the same day by the other stations presenting them and carried on the CATV systems. They cannot prevent the loss of network programs since, in a marginal market a point will be reached where the national advertiser will no longer order Appellant's station in the light of the free coverage which he can obtain through the major market stations being imported and distributed by CATV.[11] For the same reason, they cannot prevent loss of national advertising resulting from the free exposure from major markets via the CATV systems (R. 240, 242-43, 754-55, 809).

(3) Loss of network programs will have a multiplying effect since when they are no longer available locally, more people will be induced to subscribe to CATV service in order to see them, which will cause additional advertisers not to order the market for their network programs. This will cause not only a loss of revenue to Station KRGV-TV but also an increase in expenses to buy programming to replace the network programs lost (R. 241).

(4) The effect of the numerous program services from distant stations to be offered by CATV will be to substantially reduce the revenues of Stations KRGV-TV and raise its operating expenses, thereby causing a reduction in local programming it presents and threaten its continuation. It was expressly

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[11] In other words, if the advertiser decides to no longer order Station KRGV-TV, there is no local presentation of a program upon which the Commission's non-duplication rules can operate.

stated that a loss in revenue would require a reduction in salaries, personnel and overhead, and that the first place where this reduction would have to be made would be in the staff for the local programming by the Station, which is disproportionally expensive and produces relatively little revenue (R. 240-41, 244, 718, 720, 810).

The allegations of loss in revenue were supported by the Affidavit of Harry H. Wise, Jr., president of the national sales representative for Station KRGV-TV (R. 745-A -- 745-D), stating that (a) competition in 25,000 homes by CATV presenting numerous channels of programming would drastically reduce the homes delivered by Station KRGV-TV as shown by rating services which, in turn, (b) would cause a drastic reduction in the rates which Station KRGV-TV could charge; (c) that the ability of advertisers to reach a substantial number of homes in the Lower Rio Grande Valley Market via CATV by purchases of stations in the major markets which the CATV is carrying will cause many advertisers to delete purchases of the stations in the small market, including KRGV-TV, altogether[12] and (d) that the foregoing would cause "drastic" revenue losses to Station KRGV-TV.

These allegations were corroborated by Affidavits[13] of the president of Harbenito Broadcasting Company, licensee of Station KGBT-TV, Harlingen, Texas, the other television station in the Lower Rio Grande Valley, and by Station KGBT-TV's national sales representative (R. 601-05).

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12 Appellant filed a letter from the American Research Bureau (R. 746-47), the national rating service relied on in the industry, pointing out that market surveys are based on sample homes which are selected without regard to CATV connection. Thus, CATV connected homes are included in the survey and the loss of viewers in those homes to Station KRGV-TV will appear in these A.R.B. surveys. Appellant showed that there are cases where major market stations are credited by A.R.B. with viewers far beyond their limits of direct reception where they are carried and distributed by CATV, and that it is entirely possible that the Fort Worth, San Antonio, and Corpus Christi stations will obtain such published A.R.B. audiences in the Lower Rio Grande Valley (R. 709).

13 These were filed in the Petition to Deny by Harbenito Broadcasting Company which the Commission denied in its first, "Alice Cable" decision (R. 678).

The allegations set forth above did almost everything but state a specific dollar amount on the economic loss or specific programs which would be lost as a result of the grants here in issue. See *Folkways Broadcasting Co. v. F.C.C., supra,* ___ U.S. App. D.C. at ___, 375 F.2d at 304-5. But even assuming such an allegation would somehow be required, it certainly was not necessary in this case where the station operates at a loss in a marginal market and has long struggled to obtain increasing revenues for local programming (R. 237, 244, 805, 810). Indeed, its showing was so strong that dissenting Commissioner Cox believed that Appellant would prevail on the merits after the hearing. He made the following evaluation of Appellant's allegations (R. 148):

> ". . ., I think the local stations have made a showing, in accordance with our rules, which justifies a hearing as to their situation. It is clear that we must look to the potential cumulative effects of our policies. The volume of distant signals proposed to be imported into this small market 1/ is so great, and the combined population of the communities involved is such a substantial percentage of the population of the market, that it seems obvious that serious reduction in the audiences — and the revenues — of the local stations is likely to occur. I think their continued existence may be endangered, and that at the very least their ability to serve the community will be reduced. . . .
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> 1/ We must also take official notice of pending applications to bring the signals of KTLA, KHJ-TV, KTTV, and KCOP, four independent stations in Los Angeles, into Brownsville, Edinburg, Pharr, Harlingen, San Benito, Raymondville, Mercedes, and Weslaco, which will cause still further fragmentation of the audience in this rather small market."

B. The Commission Failed to Give Proper Effect to Appellant's Allegations

1. Even if the Commission Could Properly Rely on Its Original Vacated Decision, That Decision Was in Error

In its decision here under review, the Commission did not discuss Appellant's allegations of injury to the public interest. Instead, it referred to Appellant's allegations contained in its original Petition to Deny the Alice Cable applications for McAllen, alone, and treated the instant Petition to Deny as if it merely repeated the allegations made in the earlier petition. The Commission held in its earlier Memorandum Opinion and Order that the allegations of Appellant at that time did not raise any substantial and material issues which entitled Appellant to a hearing. The Commission adhered to that determination in the decision here under review, stating, "We believe that our previous Memorandum Opinion and Order in the *Alice Cable* proceeding, cited *supra*, is controlling" (R. 145). As is discussed below, the Commission's determination that the original *Alice Cable* proceeding, which dealt solely with CATV service to McAllen, Texas, was dispositive of the Petitions to Deny here under review, was erroneous. However, even if the sufficiency of Appellant's allegations be considered by sole reference to the original Petition to Deny against Alice Cable, the Commission's decision still is clearly erroneous.

In its original decision, the Commission characterized Appellant's allegations as a "naked assertion . . . of possible competitive injury" which does not support a claim "that local service to the public will be adversely affected" (R. 680). It is difficult to understand how these allegations could be termed "naked." They specifically included the following:

> (1) The populations to be served by the proposed CATV systems, the part of Station KRGV-TV's market which they represent and the number of imported, competitive channels

of programming proposed to be distributed on the CATV systems (four or more in all cases) (R. 798-99, 810-11);

(2) The long history of Station KRGV-TV in attempting to gain national advertising and network programs and the reasons why it is unable to do so in competition with major market stations; the low rates Station KRGV-TV receives for advertising it is able to sell. There were persuasive examples of network programs not ordered and not seen in the Lower Rio Grande Valley and large amounts of national advertising not ordered in the Lower Rio Grande Valley. The low percentage of national vs. local revenue for Station KRGV-TV for many years was shown (R. 805-08);

(3) The fact that national advertisers will lose interest in ordering KRGV-TV when they find they have partial coverage by purchase in major markets by the distribution of the major market stations' programming on the proposed CATV systems, and that the Commission's non-duplication rules (47 C.F.R. 74.1103) cannot prevent this (R. 809);

(4) The duplication of Station KRGV-TV's film programming, which the non-duplication provisions of the Commission's Rules cannot prevent, and the impact of its loss in value when added to the other losses which Station KRGV-TV will suffer (R. 809);

(5) The fact that Station KRGV-TV, despite the size of its market, maintains a full staff of local personnel; shoots four to six film features daily and presented twenty-six remote telecasts in an eleven month period (which are very expensive to the station) (R. 810):

(6) The fact, which distinguishes this case, that the competing signals to be introduced into the market and

> distributed by CATV *are not from a market approximately equal to the Lower Rio Grande Valley, but are from much larger markets*. As the Affidavits made clear, it is this disparity in the size of the markets — based on the long experience of Station KRGV-TV in attempting to compete with them for a part of the advertising which they receive — which makes the threat to KRGV-TV so severe (*Ibid*).

Also before the Commission for decision were the Affidavits of Station KGBT-TV's president and national sales representative, which fully supported Appellant's allegations. The Affidavit of Station KGBT-TV's national sales representative stated the difficulty in securing advertising business for these small market stations, that CATV service would reduce the local stations viewers making it more difficult to sell advertising on them, that *major market purchases carried on the CATV systems would eliminate purchases for such advertising on the local stations*, and that CATV in McAllen alone would cause substantial losses in revenue to Station KGBT-TV (R. 601-02).[14]

It is pertinent that in neither the first nor the second opinion did the Commission describe why Appellant's claims were "naked" or did not raise substantial and unresolved questions of fact. In fact, none of Appellant's allegations in subparagraphs (1) through (6), above, or the Affidavit of Station KGBT-TV's national sales representative were even mentioned by the Commission in either decision.

The only fact on which the Commission commented in the original decision was that the annual financial information filed by Stations KGBT-TV and KRGV-TV for the year 1964 showed that the two stations had combined gross revenues in excess of $1,000,000, and that each station operated profitably. The Commission did not note the large expenses that were involved in the operation of the stations, and it certainly did not

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[14] See footnote 13, supra.

advert to the very small profits of Appellant's station, its substantial programming expenses, its staff (63 persons — 36 full time, 27 part time) or the fact that the owners received no salary, dividends or other return from it, all of which the KRGV-TV financial report showed (R. 742-44).[15] As the Commission was aware from its own published television financial data, operating expenses of many television stations are $1,000,000 or more per year. Nevertheless, relying on the gross revenues reported in the Annual Financial Reports, the Commission stated that these figures do "not support the claim that Weslaco-Harlingen is a 'marginal' market or that the proposed CATV operation will 'impair the local service which the local stations can render'." (R. 680). But Appellant did not claim that from the data as to annual gross revenue it could be determined whether Weslaco-Harlingen is a marginal market or whether the CATV operation would impair the local service which Appellant can render. This was a straw-man contention erected by the Commission and then nobly struck down. Certainly if Appellant's revenue was a critical matter, it is the net profit *after expenses* which is important. We advert to this matter further hereinafter. In any event, revenue would be only one factor to be considered in connection with all of the other allegations. The Commission cannot legitimately conclude that Appellant's allegations were insufficient to entitle it to a hearing on the sole ground that the size of its gross revenue demonstrated that its service would not be impaired by the CATV authorizations.

Neither the first nor the second Commission decision considered the nature of Appellant's allegations, but, on the contrary, brushed them aside. Instead of adverting to the nature and adequacy of the allegations, both Commission decisions rested almost exclusively on policy considerations which are held to make irrelevant the allegations of injury. The Commission noted that its CATV rules and policies recognize

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[15] The record does not disclose what profit, if any, was earned by Station KGBT-TV and this information is contained solely in the Commission's confidential files.

that CATV operation has a competitive impact on local television stations and that its rules are designed to ameliorate this impact. It claims, however, that its rules providing non-duplication protection (47 C.F.R. 74.1103) "ensure that CATV performs its role without unduly damaging or impeding the growth of television braodcast service" (R. 680). This assertion, however, in effect repeated in the second decision with a statement that the non-duplication provisions will provide "adequate safeguards" to Appellant (R. 145), cannot serve as a substitute for consideration of Appellant's specific allegations.

The Commission made clear in adopting its carriage and non-duplication Rules that it was not attempting to consider or decide questions presented in specific markets including specifically whether CATV should be permitted in any market. The Commission, rather, was concerned with general "ground rules" for the provision of CATV and broadcast television service in a complementary manner. Thus, it stated that its Rules for carriage and non-duplication of programs were *minimum* requirements for fair competition and to ameliorate the impact of CATV on local television service, and that they should apply to all CATV systems and stations *without regard to the determination of the extent of the impact on local broadcast service in individual instances.* The Commission emphasized that it would give *ad hoc* consideration to individual cases under Rules it was adopting for the purpose and, with respect to microwave applications such as here involved, under Section 309 of the Act. *First Report and Order,* Docket Nos. 14895 and 15233, 30 F.C.C. 683, 4 Pike & Fischer R.R. 2d 1725 (1965) (paras. 1, 59, 68 - 82); *Second Report and Order,* Docket Nos. 14895, 15233 and 15971, 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717 (1966) (paras. 47 - 49). Accordingly, the situation here is not one in which the Commission has by rule making determined that it will give no effect under any conditions to allegations of injury made by a broadcast station because the rules and policies provide it with adequate protection.

On the contrary, between the time of the first and second decisions, the Commission enacted specific rules for the purpose of affording specific rights to broadcast stations to seek specific relief from injury to the public interest which would be caused by CATV authorizations. *Second Report and Order, supra,* paras. 97-98. Section 74.1109 (47 C.F.R. 74.1109) expressly provides that in markets such as the Lower Rio Grande Valley a broadcast station has the right, and the Commission will consider, claims of specific injury to the public interest, even though under its normal policies CATV authorizations would be granted.[16] Reference to the policies cannot, therefore, serve as a substitute for *ad hoc* consideration of the specific allegations of injury made by Appellant.

Characterization of Appellant's specific allegations as "naked" was clearly erroneous and could be made only to rationalize a decision to refuse to comply with the mandate of Section 309(d) of the Act. *Hudson Valley Broadcasting Corp. v. Federal Communications Commission,* 16 U.S. App. D.C. 1, 320 F.2d 723 (1963).

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16 On reconsideration of the Second Report and Order the Commission expressly eschewed consideration of individual cases and required that they be treated on an ad hoc basis:

> A number of petitioners, both stations and CATV systems, have set forth their particular, individual circumstances as a basis for urging some change in Sections 74.1103 and 74.1107 of the rules. While we see no reason to modify the rules in light of their contentions, this is not determinative of the question of whether petitioners could obtain affirmative relief or a waiver of the rules pursuant to a petition filed under Section 74.1109. The ad hoc procedures are the appropriate vehicle for obtaining full consideration of individual situations. Memorandum Opinion and Order, Docket Nos. 14895, 15233 and 15971, 6 F.C.C. 2d 309, 6 Pike & Fischer R.R. 2d 1677 (January 1967), para. 19.

2. The Commission Erroneously Relied Upon Its Original Decision as Controlling

The Commission's decision is most unusual in that it refused to consider Appellant's Petition *de novo,* claiming it was a repetition of its earlier Petition; the Commission, therefore, held that the instant proceeding was controlled by its first Memorandum Opinion and Order which dealt only with the Alice Cable applications to serve McAllen, Texas. It held that at that time it had considered not only the potential CATV competition in McAllen but also substantially all CATV proposals for all of the cities and towns in the Rio Grande Valley, and that nothing new had been alleged which would warrant reconsideration of the judgment reached then.

These holdings were in error and, as a result, the Commission failed to properly consider the facts now before it. By adhering to its prior conclusions without reexamining the facts before it, "however unwittingly, the Commission seems to have assumed the defense of its prior grant, rather than the public interest, as its primary role in this proceeding." *Clarksburg Publishing Co. v. Federal Communications Commission,* 96 U.S. App. D.C. 211, 215, 225 F.2d 511, 515 (1955). Indeed, its action provoked dissenting Commissioner Cox to attack the *bona fides* of the decision. Commissioner Cox said (R. 149):

> * * * I think it is *disingenuous* to say, as the majority does, that we considered the proposed CATV service to practically all the communities to be served by these applicants. It is true that some of these other communities were listed in the earlier decision in connection with our recital of the requests of KGBT and KRGV for an inquiry into overall CATV activity in the area, but, as I have already noted, we rejected that request in Paragraph 11 of the order. Reading that decision in its entirety, it is clear that we considered only the potential impact of a single CATV system in McAllen. We should therefore give careful consideration to the present allegations of adverse impact in the overall context of CATV plans in this market. (Emphasis added).

Commissioner Cox clearly was correct:

(a) The discussion of the merits in paragraphs 5, 6 and 9 of the original decision gave the population of only one community, McAllen, and discussed the potential impact only of the McAllen proposed CATV system. Appellant's allegations of the total populations to be served by CATV, the part of Station KRGV-TV's market which this represents and the number of channels of programming to be distributed (four or more channels of imported programming in all cases (R. 798-99)) were not mentioned.

(b) The Commission's conclusion in paragraph 8 that carriage and non-duplication conditions would adequately protect Station KRGV-TV are directed specifically and exclusively to *the CATV in McAllen*.

(c) The Commission's conclusion in paragraph 10 with regard to potential impact on a future UHF station is only that *"CATV operation in McAllen"* would not pose a substantial threat.

(d) The Commission in paragraph 11 specifically deferred inquiry into CATV activity in towns other than McAllen in the Valley for consideration in its continuing rule making proceeding on CATV.

The errors resulting from the Commission's attempted reliance on the old "Alice Cable" decision were highly prejudicial. As previously shown herein, critical facts which were before the Commission at the time of the first, "Alice Cable" decision were not even set down, much less discussed, in *either* decision (pages 28-30, *supra*). However, the *omission* of these facts is by no means the full extent of the error.

To bolster its attempt to rely on its earlier decision the Commission stated (Memorandum Opinion and Order, para. 5) that Appellant had not set forth any new information which would warrant reconsideration of its earlier decision with regard to the Alice Cable applications, apparently implying that no further facts could be alleged. Cf. *KGMO Radio-Television, Inc. v. F.C.C.*, 119 U.S. App. D.C. 1, 336 F.2d 920 (1964). But even the information relied upon by the Commission on its own initiative in its first decision — information then outside the record — that the Annual Financial Reports for 1964 for Stations KGBT-TV and KRGV-TV did not support Appellant's allegations, had changed. By the time of the instant decision, the Annual Financial Report for 1965 for Station KRGV-TV was on file with the Commission and it showed *declining profits* and that the owners again had taken no salary or other return. Thus, the Commission did not bother to include the new facts in the line of inquiry which it had itself opened, facts which are equally consistent — if they do not suggest — a conclusion exactly opposite from that which the Commission drew. The Commission had a duty to state these new facts where, on its own motion, it had used this line of inquiry for the only fact it had deemed worthy of discussion in its first decision.

Moreover, the Commission was completely in error in alleging that Appellant had not set forth new information. Although the Commission's decision in footnote 3 took official notice of applications by American Television Relay, Inc. to bring channels of television programming to communities in the Rio Grande Valley for CATV distribution, it made no mention of Appellant's pleadings against those applications, a *Petition to Defer Action, or in the Alternative, to Deny Application* filed in November 1965 (R. 685-89) and a *Supplement to Petition to Defer Action, or in the Alternative, to Deny Application* filed on November 22, 1966 (R. 690, 698-700), the latter filed more than two months prior to the public release of the instant decision. Those pleadings specifically requested that the common carrier microwave applications of

American Television Relay, Inc. and West Texas Microwave Co. to transmit programs to the Lower Rio Grande Valley for CATV distribution be considered jointly with the applications here under review. The *Supplement to Petition to Defer, or in the Alternative, to Deny Application* also was filed for the stated purpose of referring to additional facts with regard to the impact of CATV in the Lower Rio Grande Valley Market in a *Petition to Deny* filed on the same date against the applications of West Texas Microwave Company.

That *Petition* specifically rebutted the assumption of financial prosperity for Station KRGV-TV which the Commission had made in the first, "Alice Cable" decision (R. 722-23). It included the specific data on Station KRGV-TV's staff expenses and staff duties, details of its award winning local programming and the man hours needed to produce it (R. 728-39, 759-63). It included the itemization of the large cost and extensive duplication from signals to be imported of its library of film programs (R. 726-27). It advised the Commission of channels of programming then being proposed to be distributed by Alice Cable and Southwest CATV, respectively (*which were 7 and 3 channels more than assumed by the Commission* in paragraphs 2 and 3, respectively, as the basis of its instant decision) (R. 721-22).[17] It included the Affidavit of Station KRGV-TV's national sales representative covering the drastic reduction to be caused by the proposed CATV systems in Station KRGV-TV's revenues (which was in addition to and corroborated the prior Affidavit by Station KGBT-TV's national sales representative filed more than a year and a half earier) (R. 745-A – 745-D). It included the letter from A.R.B. to the effect that CATV listening is reflected in station ratings and showed the Commission an instance where major market stations, by CATV carriage, have achieved published ratings in distant small markets (R. 709, 746-47).

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[17] Thus is exclusive of the Los Angeles programming noted by Commissioner Cox in his dissent.

The Commission's reference to the common carrier applications filed by American Television Relay, Inc. may well be the foundation for a further attempt by the Commission to lift itself by its own bootstraps, whereby it can later claim that it has already considered those applications in the instant proceeding, much as it claims here to have considered substantially all CATV activity in the area in the first, "Alice Cable" decision. Its refusal to fairly consider the facts of the Lower Rio Grande Valley is illustrated by its careless errors even in the facts it stated. Thus, although the Commission took official notice of the American Television Relay applications, it omitted one of the signals which those applications propose to import to the Valley; this is KTVT from the Dallas-Fort Worth Market (the 15th A.R.B. Market), and makes the number of signals to be imported by American Television Relay not five, as stated by the Commission, but six.

As discussed more fully hereinafter (p. 47, *infra)* from footnote 3 in its Decision and the applications themselves, the Commission should have known that Alice Cable proposed to distribute three channels of programming more than assumed by the Commission, i.e., not five imported channels as assumed by the Commission, but eight such channels.

Moreover, as noted by Commissioner Cox in his dissent, the Commission also omitted reference to applications by the *same applicant* to import the programs of four Los Angeles, California stations.

The Commission's attempt to rely on the old, "Alice Cable" decision resulted in most of Appellant's allegations, so far as appears, never being considered. It resulted in failure of the Commission to note relevant facts, and errors and incompleteness in the facts which it purported to consider, and the erroneous conclusion by the Commission that Appellant had set forth no new facts since the original, "Alice Cable" decision, when the contrary was the fact. The Commission's decision does

not meet the minimum standards of the Act[18] and does not dispose of the serious allegations of injury to the public interest which Appellant raised.

3. The Commission's Decision Is Inconsistent with Pertinent Precedent

This Court has only recently made clear that the Commission cannot disregard reasonable evidence "suggesting that existing television service is threatened" by the establishment of CATV service. *Cedar Rapids Television Co. v. F.C.C.*, ___ U.S. App. D.C. ___, ___ F.2d ___, No. 20,783, September 27, 1967. Even in the absence of the standards called for by this Court in that decision, Appellant made a *prima facie* showing that its service is threatened and it clearly was entitled to a hearing on its allegations.

Because of the size of the market involved, the decision of this Court in *Southwestern Operating Co. v. Federal Communications Commission,* 122 U.S. App. D.C. 137, 351 F.2d 834 (1965), is especially pertinent. In that case, this Court directed that a hearing be held before a satellite television station would be authorized in Laredo, Texas, in competition with the one local television station. As in our own case, the Appellant in that proceeding had shown the marginal nature of the market, its financial position and operating costs, and that losses of national and regional revenue would require a curtailment of its local programming. In reversing the Commission, this Court recognized the particular potential for harm from a satellite to rebroadcast the programs of a station in the major market of Corpus Christi, the basic situation which Appellant has alleged here. In fact our own situation

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18 Hudson Valley Broadcasting Corp. v. Federal Communications Commission, supra. Section 309(d)(2) of the Communications Act (47 U.S.C. 309(d)(2)) provides that if the Commission, following the filing of a petition to deny, grants an application without hearing, it shall issue a "concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition."

is *a fortiori:* here the CATV programs will originate not only in Corpus Christi but also in San Antonio and Fort Worth, the latter two being much larger markets than Corpus Christi, making it all the more likely that advertisers will forego Weslaco as a market in which to spend advertising dollars.[19]

As Commissioner Cox pointed out in his dissent, the Commission's decision is also inconsistent with its own decisions.

In *Taft Broadcasting Co.*, 5 F.C.C. 2d 746, 8 Pike & Fischer R.R. 2d 1092 (November 1966) a proceeding for special relief under Section 74.1109 (47 C.F.R. 74.1109) of the Commission's Rules, the Commission designated for hearing CATV proposals in the 141st television market where CATV systems would serve communities with a population of 184,980. As Commissioner Cox pointed out in his dissenting opinion

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[19] The Commission itself has recognized the special impact which the introduction of major market programming can have on the small market. In the First Report and Order, supra, it stated as follows (para. 69):

> "As we have noted, and as NCTA itself has pointed out, the typical national advertiser (network or non-network) is barely aware of the effect of CATV upon station audience or its role in making the programs broadcast in one market available in others. It is highly probable that national advertisers will in the future take much greater account of CATV operations, and that estimates of adverse impact upon stations will become increasingly real. Rating services are beginning to supply the relevant information and the data compiled in these proceedings will undoubtedly direct advertiser attention to the significance of CATV. Advertisers normally view duplication as a waste for which they will not pay, and network affiliations and rates are based on the amount of unduplicated coverage a station can provide. 46/ As advertisers become aware that the purchase of big city stations may include coverage of secondary markets, it is likely that they will react. 47/ (Underscoring added).
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>
> "46/ (Footnote omitted)
>
> "47/ Should the marketplace become aware of these data the economic results could be disastrous for small market stations. The networks would cut back the station's hourly rate, and the spot market or the rating agencies would adjust the audience rating to effect a higher CFM. Seiden Report, p. 77."

(R. 150), while the *Taft* case involved UHF stations, there is no distinction in principle between UHF and VHF stations where an issue of harm to the public interest is properly raised, and the conclusions of the Commission in *Taft* certainly should be applicable to Appellant which is in the *163rd* television market and faces potential CATV competition in communities with a population of more than *240,000*.

Likewise, in *United Transmission, Inc.* 6 F.C.C.2d 786, 9 Pike & Fischer R.R.2d 482 (February 1967), another special relief proceeding under Section 74.1109 of the Commission's Rules, the Commission designated for hearing CATV proposals to introduce distant signals from major markets into the coverage area of a VHF television station, although the station was a semi-satellite of a station in a major market. The station alleged that its "net" population served (after deducting populations served by its major market parent station) was 159,978 persons and that the CATV systems proposed operation in communities with 93,014 persons. It was alleged that, although the overall operation of its several interconnected stations was profitable, that proper accounting would show that in its last year the station in issue only had a *profit* of approximately $16,000. The Commission stated (6 F.C.C.2d at 787, 9 Pike & Fischer R.R.2d at 484):

> 4. As is frequently the case in economic impact cases, KSN's underlying assumptions leave lingering doubts, such as: Whether only the "net KCKT grade B area" is the proper measure of KCKT's circulation or profitability; whether KSN's accounting allocations are correct; and whether -- in this market — KSN's estimates of the cost of CATV competition are realistic, particularly since KCKT is a semisatellite. But whatever our final decision, KSN's allegations and supporting documentation evoke sufficient concern to require evidentiary hearing as a precondition to their resolution, and the opposing arguments, largely devoid of similar documentation, must be rejected. Hearing will therefore be ordered.

The Commission, therefore, in the instant case has departed from the standards it regularly has applied in cases of this type.[20]

4. The Commission Improperly Rejected Appellant's Allegations That the Introduction of the Proposed CATV Service Would Harm Future UFH Service in the Area

Although it did not affect it directly, Appellant also requested in its Petition that the applications here should be designated for hearing on the ground that it was necessary to determine the impact of the authorizations on future UHF service in the area.

Only UHF channels are available in the Lower Rio Grande Valley for a future third station which would provide full, three network service in the area. UHF stations, of course, for various reasons rooted in technical factors, face considerable difficulties in achieving a significant audience and advertising revenue on which to survive. Nevertheless, the Commission has found that activating UHF channels is essential for a nationwide television system and has adopted a policy of fostering their growth by creating optimum conditions for it however possible. The Commission has designated for hearing proposals by VHF stations to place *partial* coverage over UHF areas, because of the possible impact on future UHF service. E.g., *Triangle Publications, Inc.*, 29 F.C.C.

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[20] E.g., in Minnesota Microwave, Inc., 1 Pike & Fischer R.R. 2d 755 (1964), the Commission held that it is required to inquire into all effects of a radio grant on the public interest and designated for hearing microwave applications which would have served CATV systems in communities having 9% of the population within the complaining station's Grade B contour even though the station had to itself, exclusively, within its Grade B contour, a population of more than 235,000 persons.

In Alabama Microwave, Inc., 1 F.C.C. 2d 342, 5 Pike & Fischer R.R. 2d 626 (1965), the Commission designated for hearing microwave applications which represented a potential loss via CATV of approximately 5% of a station's audience of approximately 73,000 homes. The Commission noted and relied upon the allegations, as made by Appellant here, of loss of national sales revenues which would occur from the loss of audience.

315, 17 Pike & Fischer R.R. 624 (1960), aff'd *sub. nom. Triangle Publications, Inc. v. Federal Communications Commission,* 110 U.S. App. D.C. 214, 291 F.2d 342 (1961); *Triangle Publications, Inc.,* 37 F.C.C. 307, 3 Pike & Fischer R.R.2d 37 (1964); *Central Coast Television,* 2 F.C.C.2d 306, 6 Pike & Fischer R.R.2d 719 (1966); *Cosmos Broadcasting Corp.,* 31 F.Reg. 14896 (November 24, 1966), 8 Pike & Fischer R.R.2d 975; *Selma Television, Inc.,* 30 F.Reg. 4006 (March 26, 1965), 4 Pike & Fischer R.R.2d 714; *KTIV Television Co.,* 29 F.Reg. 3544 (March 19, 1964), 2 Pike & Fischer R.R.2d 95, and 4 Pike & Fischer R.R.2d 243. There is no discernible difference in the fact that the coverage here would be by CATV.

In its CATV rule making proceedings the Commission reiterated its concern for fostering UHF stations and noted the impact which importation of competitive program services by CATV might have on them. *First Report and Order, supra,* paras. 70-75; *Second Report and Order, supra,* para. 114.

In denying Appellant's request for an issue on the impact of the proposed microwave authorizations on the implementation of a future UHF station in the Lower Rio Grande Valley, the Commission referred to its old, "Alice Cable" decision where it had held that its policy in such cases in effect at that time requiring a hearing applied only where a new UHF station would depend primarily upon independent programming (i.e., be it a fourth or fifth station in the market), and that it did not apply where the UHF station would be a third station in the market and a network affiliation presumptively would be available (R. 681-82). Thus, the Commission in the present decision simply reiterated its holding that the carriage and non-duplication rules would provide *adequate protection* for a UHF station in the Lower Rio Grande Valley.

But Appellant had shown that network affiliation cannot guarantee the ability of an existing station in a small market to continue to provide local service or survive where numerous channels of programming *from*

stations in major markets are to be used by the CATV systems. The Commission itself has recognized the special potential for impact on local television in this situation (footnote 19, *supra)* and has designated applications for hearing where the UHF to be protected was not a 4th or 5th service. (See cases cited, *supra.)*

Moreover, the policy to which the Commission adverted in the old, "Alice Cable" decision was an interim policy. Between the time of the first and the present decisions in this proceeding, the Commission again considered this matter in its *Second Report and Order, supra.* In the latter proceeding the Commission changed its policy and determined that even though a UHF station would be the third station in a market this did not insure the availability of network programs and indeed, that established CATV operations in the market could prevent or postpone the introduction of a third, UHF service. The Commission stated its further conclusions as follows (*Second Report and Order, supra,* para. 127):

> We have focused in the above discussion on the independent UHF station. But as interested parties such as Storer have stated, there is also a problem with respect to the new UHF station in a market with two VHF stations. The UHF station does not necessarily obtain a full line of network programming in such markets; either initially or for a considerable period of time, it may be dependent to a very substantial extent on non-network fare. Further, several parties have expressed the fear that because of CATV, such new UHF stations will not be able to obtain a primary network affiliation. Finally, we note that to a significant degree, whether rightly or wrongly, CATV penetration would appear to have a discouraging effect on entry of new UHF stations (or on the substantial expenditures which must be made for the high tower and power necessary for an effective operation).

* * *

> We think it important, in view of the critical period facing UHF, that the UHF entrepeneur be given a forum for thorough exploration of this serious problem.

The bald statement, "adequate protection", which is vague at best ("adequate" is not defined and we are left to guess as to what the standard of adequacy may be), is not supported by any policy. It is wholly insufficient to overcome the serious issue which the Commission itself has recognized and which was fully raised by Appellant's allegations.

As Commissioner Cox stated in his dissent, the proposed CATV activity would appear to eliminate the possibility of activating any of the UHF channels (R. 148). A hearing was required on this issue before the Commission granted the microwave authorization to install the competing CATV services. *Louisiana Television Broadcasting Corp. v. F.C.C.*, 121 U.S. App. D.C. 24, 347 F.2d 808 (1965).

The allegations of Appellant were uncontested. Appellant showed its long difficulties in its small market, its extensive local programming and why it will lose revenue — with consequent loss of its local programming and possibly its existence — if unlimited CATV operation is permitted on the scale proposed in its market. This was supported by affidavits of experts in the field. Appellant could not plead its case more. No request was made by the Commission for any additional information or explanation. Appellant is entitled to a hearing under Section 309 of the Act on the unrebutted and unresolved issues of harm to the public which it has raised.

II. THE COMMISSION WAS REQUIRED TO CONSOLIDATE AND CONSIDER ALL MICROWAVE APPLICATIONS PROPOSING TO IMPORT DISTANT SIGNALS FOR CATV DISTRIBUTION BEFORE IT COULD DETERMINE WHICH OF THOSE APPLICATIONS WOULD SERVE THE PUBLIC INTEREST, CONVENIENCE AND NECESSITY.

A. The Commission was Required to Consolidate for Consideration All of the Microwave Applications to Introduce Distant Programs for CATV Distribution in the Lower Rio Grande Valley in Order to Determine the Full Impact Which They Would Have Upon Local Television Service.

Appellant filed a *Petition to Defer Action or, in the Alternative, to Deny Application* in December 1965 against the applications of American Television Relay, Inc., under File Nos. 2267-78-C1-P-66. On November 22, 1966, Appellant filed a *Supplement to Petition to Defer Action or, in the Alternative, to Deny Application* against the same applications of American Television Relay. The substance of the *Petition to Defer* and the *Supplement to Petition to Defer* were that the American Television Relay applications and the applications of West Texas Microwave Co. proposed additional channels of microwave service for purposes of transmitting television programs to the Lower Rio Grande Valley for CATV distribution, and that all of the microwave applications, including Intervenor's, should be considered together so that the Commission could decide the merits of all of them in the light of their aggregate effect (R. 685-9, 690, 698-700). That request, in effect, was denied without consideration by the Commission's decision here.

In its Memorandum and Order which is the subject of this appeal the Commission stated (Decision, footnote 3) that it took official notice of the American Television Relay applications. However, the Commission failed to note either the true implications of those applications

or the problems which had arisen as a result of the four microwave applicants and their several applications, particularly the uncertainty as to which programs really would be imported and distributed in the Rio Grande Valley.

The Commission noted that the American Television Relay applications proposed to provide five channels of service to McAllen Cable TV Corp. (Decision, footnote 3). So far as appears, the Commission was oblivious to the fact that McAllen Cable TV Corp. is merely an operating subsidiary of Alice Cable (R. 377, 674-7) and that the facts it stated really meant that Alice Cable would be providing to its customers not five imported signals as assumed by the Commission (Decision, para. 2) to compete with the local television stations for viewers, but eight such signals.[21] Had the Commission considered all of these multiple applications it could not have fallen into this apparent error. It would have known that Alice Cable, in fact, has proposed to distribute some *seven channels of programming more than assumed by the Commission in the instant decision* (R. 721-2), *i.e., some twelve channels of programming in all.*

The Commission also failed to recognize that, since McAllen Cable TV Corp. and Alice Cable are one and the same, two of the channels of service proposed to be delivered to McAllen under the American Television Relay applications represent a duplication of the same program service proposed to be delivered there by Alice Cable under its own applications which the Commission has here granted.

Similarly, the Commission stated that one of American Television Relay's customers would be Valley Microwave Transmission, Inc. But Appellant had advised the Commission (R. 721-2) that all of the franchises held by Valley Microwave Transmission, Inc. had been sold to Southwest CATV. Thus, the signals which American Television Relay, Inc. proposed to import apparently were to go to Southwest CATV, duplicating the microwave

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[21] As previously noted, the Commission failed to note that American Television Relay, Inc. actually proposed to import a sixth channel of programming, Station KTVT, Fort Worth, Texas; this would raise the imported channels to be distributed by Alice Cable to nine.

channels and programming which the Commission in this proceeding authorized Southwest CATV to import with its own, private microwave facilities.

Further, Southwest CATV also is the proposed customer of West Texas Microwave Co. for programs identical with programs which it proposes to import itself under its private microwave applications granted here (R. 703-4).

Moreover, as noted by Commissioner Cox in his dissent (R. 148), American Television Relay has filed additional applications to import to the Lower Rio Grande Valley the programs of four Los Angeles, California, television stations, to be delivered to Southwest CATV. Appellant had advised the Commission that Southwest CATV proposed to distribute some three channels more of programming than assumed by the Commission in the present decision (R. 721-2). The Los Angeles programming would have raised this to *seven channels more than assumed by the Commission, or a total of some fourteen channels of programming to compete with the local television stations.*

By failing to consider all of these applications together, the Commission failed to have any conception of the extent of the programming proposed to be distributed by CATV in the Lower Rio Grande Valley Market.

It also failed to recognize the question, which Appellant had clearly raised (R. 711-13), of the true utilization to be made of all of the duplicating microwave channels. The common carrier applications include *orders for service* by Alice Cable, Valley Microwave Transmission, Inc. and Southwest CATV, Inc. Thus, there was a clear conflict in representations by these four applicants to the Commission: they

proposed duplicating common carrier and private microwave services.[22] The Commission's holding that it had considered a substantial part of the CATV activity in the Lower Rio Grande Valley in its first, "Alice Cable" decision is patently untrue. In fact, there was confusion at the time of the present decision as to the true use of all of these applications, which, in the aggregate, proposed 26 channels of television program service to the Lower Rio Grande Valley, and what programs would be transmitted by them to be distributed by the CATV systems in the Lower Rio Grande Valley.

By ignoring Appellant's request for joint consideration of the applications the Commission has forced Appellant to repetitive litigation, for no apparent reason, contrary to Appellant's interests and the public interest.

Unless the Commission is prepared to admit almost unlimited invasion of the Lower Rio Grande Valley by programs from stations anywhere and everywhere — indeed, from as far as Los Angeles, California — it had to resolve the impasse presented by all these applications, to know and decide among the various importation proposals. By acting without accurate knowledge — or, indeed, any consideration — of all of the co-pending proposals, it has effectively prevented any action other than to grant them all. If a choice is to be made, the remaining co-pending applications clearly must now be considered; otherwise, if the Commission should decide that additional imported programs would

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22 The Petition to Deny the West Texas Microwave applications and the Supplement raised the question, in the light of the foregoing, as to whether American Television Relay might have changed its plans and now propose to provide channels of service which would not duplicate those which Alice Cable and Southwest CATV were proposing to provide to themselves. It pointed out that American Television Relay is listed as a customer by Dal-Worth Microwave, Inc. for any independent CATV programming service which it proposes to provide under other microwave applications which it has filed with the Commission. This could mean that one or more additional channels of totally different program service were proposed for the Lower Rio Grande Valley CATV systems (R. 711-13).

have a cumulative impact on local television service contrary to the public interest, consideration of the proposals of the remaining applicants is foreclosed by the microwave grants made here. Moreover, successive consideration of such proposals subjects Appellant to the risks of "chipping" away of its rights of exactly the type which this Court condemned in *Interstate Broadcasting Co. v. Federal Communications Commission*, 109 U.S. App. D.C. 190, 235 F.2d 270 (1960). Where impact of microwave grants to provide programs for CATV distribution on the public interest is involved, Appellant is entitled to have *all* of those proposals considered at one time so the full potential impact on the market can be determined and a rational decision reached. It is clear that these applications, if properly considered together, raised substantial and material questions which required a hearing under Section 309 of the Act before the Commission could determine that their grant would serve the public interest.

B. The Commission was Required To Consider All of the Microwave Applications To Provide Identical Program Services To the Lower Rio Grande Valley Under Section 307 (b) in Order to Provide Fair, Efficient, and Equitable Distribution of Radio Service

Under Section 307 (b) of the Act, the Commission in considering applications is required to make such distribution of frequencies as is fair and efficient. It is axiomatic that the efficient ultilization of available frequencies does not require duplication of facilities and services.

In this case the following applications are involved, providing the duplicative services indicated:

	Signals to be Imported				
	San Antonio	Fort Worth	Corpus Christi	Mexico	Los Angeles
Alice Cable	KLRN WOAI KWEX KENS KONO				
Southwest CATV	KLRN KWEX	KTVT	KIII KRIS KZTV	XEFE	
American Television Relay	KLRN KWEX	KTVT	KIII KRIS KZTV		KTLA KHJ KTTV KCOP
West Texas Microwave	KLRN KWEX	KTVT		XEFE	

Alice Cable and Southwest CATV are the principal or exclusive customers in the Lower Rio Grande Valley for the programs to be imported by American Television Relay and West Texas Microwave Co.

The wasteful duplication in these proposals is apparent. From the foregoing the following questions were presented and required

consideration before the instant applications could be granted:

(1) Whether a need exists for all of these microwave radio authorizations and frequencies insofar as they would provide identical program service?

(2) To what extent does the grant of the private applications foreclose need for the same service proposed by the common carriers? The private and common carrier applications for most of the services are mutually exclusive since grant of the private applications will eliminate the principal or exclusive customers for the proposed common carrier services.

(3) Assuming that the common carrier applications are to be granted in part, the grant of the private applications will remove customers, thereby raising the rates which the common carriers would be required to charge, contrary to public interest. Thus, for example, Southwest CATV is West Texas Microwave's only proposed customer in the Rio Grande Valley. The grant of the Southwest CATV applications has in effect denied the West Texas Microwave applications by eliminating the customer which is required in order to show need for the proposed common carrier service.

(4) Could the Alice Cable and Southwest CATV applications be transferred to the new Community Antenna Relay Service which the Commission had just created as the exclusive service for future use by CATV systems to provide imported programming and which included provisions for sharing of facilities in order to avoid duplication and waste of frequency spectrum?

(5) Would it serve the public interest to grant private microwave applications as opposed to common carrier microwave applications to provide the same service where the common carrier applications could serve all parties and would be available to other members of the public who in the future might have a need for such service?

The Commission's concern for efficient use of available frequency space is long standing. Thus, in its *First Report and Notice of Proposed Rule Making,* in the Matter of *Reliability and Related Design Parameters of Microwave Radio Relay Communications Systems and Resultant Impact upon Spectrum Utilization,* 32 F.Reg. 13723 (September 30, 1967), the Commission determined for reasons of conservation of available frequency space to continue to prohibit the use of frequency diversity to obtain greater reliability of service in private microwave systems.[23] This policy clearly raised a question as to whether the applications of Alice Cable and Southwest CATV, which duplicate two channels of service (KLRN and KWEX) but do *not provide the benefits of frequency diversity,* would serve the public interest.

Due to the unusual utilization for CATV purposes and incipient crowding which it portended of the frequency bands available to private microwave users generally, the Commission undertook, during the time when the Alice Cable and Southwest CATV applications were pending at the Commission, to create a new service in another area of the frequency spectrum for all private microwave authorizations to serve CATV systems. Since the Alice Cable and Southwest CATV applications were already on file with the Commission before this new service was adopted,

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[23] Frequency diversity utilizes two frequencies to transmit the same intelligence over the same microwave path in order to achieve greater reliability.

they were not required to shift to the new service, the Community Antenna Relay Service. Nevertheless, they will be required to shift to the new service in the future under the rules which the Commission adopted.

In its *First Report and Order and Further Notice of Proposed Rule Making,* Docket No. 15586, 6 Pike & Fischer R.R.2d 1549 (October 18, 1965), creating the new service, the Commission was concerned with the need for efficient use of frequency spectrum. In order to promote such efficient use it determined to provide for sharing of facilities in the new service not only between two or more CATV system operators but also between CATV operators and television station licensees. The Commission determined that "initially" it would not require cooperative arrangements between microwave system applicants in the new service. The Commission then went on to express its concern with the need for conserving frequency space, and stated its policies as follows *(First Report and Order, supra,* para. 48):

> With respect to interconnection between CAR licensees and common carriers, a different situation may prevail. We recognize that common carrier interconnection with CAR licensees, upon a request for common carrier service, might avoid unnecessary duplication of facilities and hence achieve a more efficient utilization of spectrum space. It would obviously be undesirable, if not entirely impracticable, to authorize frequencies for the use of each of a large number of CAR licensees in order to permit each to relay entirely over its own facilities the same signals proposed to be relayed by the others over substantially the same routes. For example, we could not authorize frequencies to each of hundreds of CATV systems located west of the Mississippi for private, duplicatings microwave facilities into Chicago, New York or other major cities in order to obtain the signals of independent television stations in those cities. The long-distance relay of television signals should usually

> be on common carrier facilities.[17] *And, ordinarily, CAR systems should not duplicate each other's facilities.* It may be that CAR facilities would be more appropriately utilized to forward signals to CATV systems located away from the common carrier routes or to obtain relatively nearby "off-the-air" television broadcast signals. (Emphasis added).
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> [17] (Footnote omitted)

The Commission made its intent even more clear in its statements with regard to cooperative use of microwave facilities by CATV operators and broadcast licensees (Para. 53).

> ***It has occurred to us that spectrum space might be conserved, and duplication of facilities avoided, in some instances if CATV systems or television broadcast stations, which operate in fairly close proximity and obtain program material by microwave relay, were permitted to supply the same program material to each other and to interconnect their relay facilities.
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> * * *
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> Cooperative arrangements on a cost-sharing basis might result in greater over-all television service to the public, at less cost to both the CATV operator and the television broadcast licensee. Moreover, since the CAR service is sharing frequencies used by television intercity relay stations, cooperation to avoid duplication of facilities might achieve more efficient spectrum usage or even prove necessary to accommodate all frequency requirements in a particular geographic area within the available spectrum space.

The Commission's comment concerning the advantages of savings in cost are clearly applicable here since the cost of the microwave systems ultimately must be charged to CATV customers and increase the cost of this service to the public. The Commission's remarks with regard to saving frequency spectrum are, if anything, more applicable to

Intervenors, since their applications are in the service which the Commission in this proceeding was expressly attempting to relieve of congestion by eliminating proposals such as those of the Intervenors.

We do not suggest that as an "initial" matter the Commission was required to force sharing of the private microwave systems involved here. However, the "initial" situation to which the Commission referred in its rule making was no longer presented. The original grant of the Alice Cable applications had been set aside because of the mutual interference which would have existed between these closely parallel systems. (R. 684, 501, 498). Thus, the exact situation of duplicate services along the same route which the Commission stated it would not ordinarily allow was presented and presented, moreover, in a service where the Commission desired to have in the future microwave no systems of this type. It was necessary for Alice Cable to amend its applications to a new route and make frequency changes in order to eliminate the problem due to the lack of sufficient frequencies for both Alice Cable and Southwest CATV in the same area (R. 491-3). Yet although the Commission had expressly favored sharing of facilities under such circumstances, so far as appears, no effort was made here to encourage or investigate it. Indeed, the Commission apparently encouraged the prosecution of these separate microwave systems in the old, general service (R. 491).

The Commission has uniformly held hearings to determine the need for duplicate common carrier services whenever applications involving it have been presented. *Collier Electrical Co.*, 15 Pike & Fischer R.R. 428 a (1957); *Blackhills Video Corp.*, 22 F.C.C. 884, 13 Pike & Fischer R.R. 1241 (1957); *Western Union Telegraph Co.*, 34 F.C.C. 1030, 25 Pike & Fischer R.R. 855 (1963); *Microwave Communications, Inc.*, 6 Pike & Fischer R.R. 2d 952 (1966); *General Telephone Co. of Northwest, Inc.*, 32 F.R. ___ (F.C.C. 67-1078, released October 6, 1967). These hearings also uniformly determine which of the applicants propose the best service in rates and facilities to the public.

The Commission cannot ignore its own policies for conservation and efficient use of frequency spectrum, or the necessary effects which grants of some of these co-pending applications must have on the merits of those remaining. The several co-pending applications proposing numerous identical program transmission services constitute, so far as can be determined, a unique development in microwave allocation by the Commission.

By granting the private applications here, as previously noted, the Commission has apparently foreclosed grant of the co-pending common carrier applications (due to the fact that the proposed common carrier customers will now be providing their own microwave services). Moreover, it has lost the opportunity to choose between the various applications.

The numerous co-pending applications here require the Commission and, at the same time, afford the Commission a unique opportunity to exercise its powers under Sections 303 and 307 (b) of the Communications Act to provide the most "fair, efficient, and equitable distribution of radio service." To treat the applications independently as the Commission has here done, is to violate its own policies for efficient utilization of spectrum and the mandate of Section 307 of the Act. Appellant requested that all of these applications be considered together in order to avoid this type of result and afford the full consideration of them. The Commission's failure to grant that request was in error.

CONCLUSION

WHEREFORE, in view of the above, it is respectfully requested that this Court reverse the decision of the Commission and remand the cause with directions that the Commission grant the evidentiary hearing requested by the Appellant and required under Section 309 (e) of the Communications Act on the issues raised by Appellant, and further to direct the Commission to take such other action as the Court may deem just and proper.

Respectfully submitted,

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APPENDIX

STATUTES AND RULES INVOLVED

Communications Act of 1934, as amended (47 U.S.C. 151, et seq.):

Sections 303(a), (b), (c) and (g): General Powers of the Commission

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall —

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

* * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 307(b): Allocation of Facilities; Term of Licenses

Sec. 307. (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Sec. 309: Action Upon Applications; Form of and Conditions Attached to Licenses

Sec. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application —

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis,

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Subsection (b) of this section shall not apply —

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for —

(A) a minor change in the facilities of an authorized station,

(B) consent to an involuntary assignment or transfer under section 310(b) or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control,

(C) a license under section 319(c) or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(b) where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a).

(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and

if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act; (3) every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 of this Act.

Federal Communications Rules and Regulations (47 C.F.R.):

§74.1103 Requirement relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of the translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section.

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party

pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of §74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of §74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporaty relief.

(h) Where a petition for waiver of the provisions of §74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

* * * *